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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 25

COMMONWEALTH OF PENNSYLVANIA, *ex rel.*
ELMER SULLIVAN, Petitioner,

v.

STANLEY ASHE, Warden, State Penitentiary,
Western District of Pennsylvania, Respondent.

On Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA.

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OPINION OF THE COURT BELOW.

The opinion of the Court below (r. 22) is reported in volume 325 of the Pennsylvania State Reports, page 305.

JURISDICTION.

This petition involves the validity of a statute of the Commonwealth of Pennsylvania which is alleged to be repugnant to the Equal Protection provision of the Fourteenth Amendment to the Constitution of the

United States. The Supreme Court of Pennsylvania dismissed a petition for a writ of habeas corpus, (r. 26), which alleged that petitioner was illegally confined and restrained of his liberty in the Western Penitentiary of Pennsylvania, (r. 2).

The Court below specifically passed upon the constitutional question, (r. 22, 26), as to whether or not the Pennsylvania Act of 1860, March 31, P. L. 382, Section 3, under which the petitioner was sentenced, violated the constitution provision above mentioned.

The petitioner is now confined in the Western Penitentiary of Pennsylvania by virtue of his sentence under the Pennsylvania Act complained of.

STATUTE INVOLVED.

The Act of Assembly (1860, March 31, P. L. 382, Section 3) complained of in this action reads as follows:

> **"Escape or Rescue of Prisoners—Escape and Breaking Prison.** If any person arrested and imprisoned, charged with an indictable offense, shall break prison, or escape, or shall break prison, although no escape be actually made, such persons shall be guilty of a misdemeanor, and on conviction be sentenced to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding two years, if the criminal charge on which such person stood committed was a crime or misdemeanor punishable, on conviction, by imprisonment by separate or solitary confinement at labor; or to imprisonment not exceeding one year, if such charge was a crime or misdemeanor punishable, on conviction, by simple imprisonment without labor; if any prisoner imprisoned in any penitentiary or jail, upon conviction for a criminal offense, other than murder in the first degree, or where the sentence is for imprisonment for life, shall break such penitentiary or jail, although no

escape be actually made by him, such person shall be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped, or broke prison although no actual escape was made by him."

ARGUMENT.

I.

The statute in fixing the maximum sentence for escape to be a period of time not exceeding the original period for which the prisoner was sentenced does not make an unreasonable classification.

It is a universally recognized principle that the background of an offender is an important factor in the determination of the gravity of his offense and the sentence to be imposed. This is recognized in habitual criminal statutes which have been held not to be in violation of the Fourteenth Amendment to the Constitution: *Graham v. West Virginia,* 224 U. S. 616; *Moore v. Missouri,* 159 U. S. 673. The statute in question contemplates the background of the offender and permits it, in the discretion of the sentencing judge, to be made a factor in arriving at a just sentence. The legislature of Pennsylvania, when it enacted the statute, was entirely within its power. The comparative gravity of criminal offenses and whether their consequences are more or less injurious, are matters for the State itself to determine: *Collins v. Johnston, Warden of the California State Prison,* 237 U. S. 502, 510. The Petitioner quarrels with the reasoning be-

hind the passage of the act and gives examples to show that the legislature was not correct in assuming that one serving a heavier sentence is potentially a greater danger to society than one serving a lighter sentence. In this he makes his own, individual judgment superior to that of the legislature to which the people in their sovereign capacity have delegated the law-making power. This reasoning, if not specious, would apply to any sentence meted out to any prisoner. One sentenced to ten years for robbery might well advance the same argument and successfully maintain that, in his opinion, robbery is not so serious as involuntary manslaughter which carries with it a maximum sentence of three years. The legislature deemed it the graver offense to escape from a long sentence than from a short one. In this it was acting according to its rights: *Collins v. Johnston, Warden of the California State Prison, supra.*

The escaping convict, by his act of breaking prison, places himself at once in the same category with all other escaping convicts serving like sentences. He cannot receive a greater sentence than other convicted prison breakers who were originally sentenced to serve an equivalent term of imprisonment. Where punishment is dealt out to all alike who are similarly situated, there is no violation of the Fourteenth Amendment: *Moore v. Missouri,* 159 U. S. 673; *Pace v. Alabama,* 106 U. S. 583; *Leeper v. Texas,* 139 U. S. 462.

The argument advanced by Petitioner (which he supports by citation of *In re Mallon,* 16 Idaho, 743, 744, 745) that the statute makes the escape from prison the offense and not the escape from the punishment of

such imprisonment and is therefore unreasonable cannot be sustained by logic. The fact of imprisonment for crime must, of necessity, connote the fact of punishment. Thus, one who escapes from prison automatically escapes from the penalty attendant upon his confinement. One does not escape from prison merely because it is a structure bearing that name but because of the fact of confinement within the prison. It is the loss of liberty which impels a convict to seek escape. To hold that the legislature of Pennsylvania must specifically indicate that the penalty to be inflicted for prison breach is because of the punishment behind the imprisonment is to require that it specifically indicate something that is obviously within the intention of the act itself.

If the act were to fix the outside limit at one hundred years instead of basing it upon the original sentence there could be no argument advanced that there was an unreasonable classification for the reason that all would be subject to the same penalty. Nor could the same argument apply if the legislature had enumerated every offense known to the law of Pennsylvania and then specified that the maximum penalty for each offense should be the maximum sentence for escaping imprisonment for such offense. In either event the escaping convict would be subjected to the likelihood of having a much more severe punishment inflicted than could be imposed under the present act. We know of no Pennsylvania act which imposes a penalty of one hundred years, and it is generally conceded that the maximum penalty for crime is seldom inflicted unless the offender be an habitual one or hardened to a large degree. Thus, if either of the possible acts

above mentioned were in force at the time Petitioner escaped he would have been faced with the possibility of a much larger penalty than the one which was actually imposed. He was originally confined for the crime of Breaking and Entering a Store Building with intent to Commit a Felony; a crime which has a maximum penalty of ten years. In the first of the supposed acts of assembly discussed above he could have, upon escape and recapture, been sentenced to anything up to one hundred years; in the second, he could have been sentenced to ten years. Either sentence (which would have been as the acts make no unreasonable classification) might conceivably be far greater than the one he received under the act in question. It cannot, therefore, be said that it is unreasonable.

It is complained that the act requires the imprisonment for escape to be "of the like nature" as the original imprisonment. Here again the legislature was acting within its power in determining the comparative gravity of offenses. A hardened criminal confined at hard labor could not, as a matter of common sense, expect to receive a simple imprisonment sentence for attempting to escape. The obvious purpose of the act was to discourage prison breach. If a convict finds his confinement so onerous as to tempt him to flee, his caution will urge him to pause and hesitate if he can be assured that any future penalty will be of like nature and kind as the one at present inflicted. It is submitted that the effect of the act would be destroyed or at least modified if the escaping convict had hopes of changing the nature of his punishment. In this phase of the act we find nothing contrary to the rule laid down in *Moore v. Missouri*, 159 U. S. 673;

Pace v. Alabama, 106 U. S. 583 and *Leeper v. Texas,* 139 U. S. 462 as recited above. The punishment is here inflicted on all alike who are similarly situated. Hence, there is no violation of the Fourteenth Amendment.

In brief the contention of the Commonwealth of Pennsylvania may be summarized as follows: The comparative gravity of criminal offenses is for the State itself to determine. In using a previous sentence for crime as a yardstick to measure the maximum sentence for escaping prison, the State is within its power. "They (old offenders) are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted": *Graham v. West Virginia,* 224 U. S. 616, 623. As the Petitioner aptly puts it in his brief (p. 7): "The sentence for the second offense is made dependent upon the fact, easily ascertainable, of a prior conviction, and so the classification applies to all second offenders alike and is reasonable." Here the fact of a previous imprisonment and its duration is easily ascertainable. The classification extends to all convicts serving periods of time of like character. Hence, the classification is reasonable.

II.

Cases relied on by Petitioner.

It is important for purposes of this case to differentiate the cases cited by Petitioner in support of his contentions. *In re Mallon,* 16 Idaho 737 and *State v. Lewin,* 53 Kan. 679, are cases based upon statutes which make the sentence for escape mandatory. The

essential element of the statute in question here is the discretionary power vested in the sentencing judge. The act merely instructs the conscience of the court relative to the past criminal activities of the escaped convict and names a maximum term as the determining limit beyond which the court must not go. In other words, the original sentence imposed upon the convict becomes a factor merely in the determination of the sentence; it is not the sole guide upon which the court must rely. It is conceivable that this feature of the act was inserted therein purposely to cover a situation such as the one imagined by the Petitioner (Brief p. 8) wherein the convict, without *mens rea,* is guilty of a technical breach of prison.

The other case recited by Petitioner, *i. e. State v. Johnsey,* 287 Pac. 729, is more nearly in point with the case at issue here. We agree that the result of said case is contrary to our views but point out that two of the authorities relied upon by the Court in that case are *In re Mallon* and *State v. Lewin,* the two cases which we have already distinguished from the one at bar. We also disagree with the reasoning of the Court in that it assumes that the original sentence is a matter entirely disconnected with the crime of escape. It is no more disconnected than is an original offense in an habitual criminal case. Robbery B, if committed by the same man who has already been convicted of Robbery A, is aggravated by the fact of the previous conviction. This we have seen, when applied in an habitual criminal statute, is not repugnant to the Federal Constitution. "The fact of such [prior] sentence, indicating the gravity of the offense, affords a reasonable basis for classification": *Graham v. West Virginia,* 224 U. S. 616, 630. In all habitual criminal stat-

utes the probability arises that the subsequent conviction is not factually connected with former offenses. The relationship between the two rests in the recidivistic qualities of the offender himself. Thus, it is error to affirm that there is no connection between the two convictions.

III.

The practical application of the present statute is of no moment in determining the question of its constitutionality.

Evidence of the uniform imposition of the maximum sentence under the statute in question as shown by Petitioner's brief (pages 14 to 20) is not proof of the denial of equal protection of the laws as guaranteed by the Federal Constitution. Before he can show that he was denied equal protection of the laws, the Petitioner must establish the fact that he was subjected to a greater penalty under the Act than were other prisoners under like circumstances and conditions: *Missouri v. Lewis,* 101 U. S. 22. This rests in the body of the statute itself and not in the practical application of it. There is no contention that the sentencing judge exceeded the limit fixed by the law-making power, *i. e.* the legislature. If the sentencing judge has followed a course of conduct within the contemplation of the law, the Petitioner's quarrel is with the judge himself and not with the act of assembly which informs his conscience merely and dictates the extreme limit beyond which he must not go in imposing sentence. Any constitutional argument against a statute must, of course, be valid at all times during the life of said statute. The present argument advanced by Petitioner could not have been invoked by the first convict to be

sentenced agreeably to the law. He would have had to confine himself to defects in the law itself and could not have referred to a course of conduct which was not yet then in operation. We conceive that the Petitioner must show that the act in question is, not only now but always was, unconstitutional without recourse to evidentiary material relating only to the practical application of it.

IV.

Escape laws of other states, if not adjudicated as to constitutionality by the Supreme Court of the United States, are not pertinent to any of the issues raised by this appeal.

Each Sovereign State has the exclusive function of describing the punishment to be inflicted in particular cases within its boundaries: *Collins v. Johnston, Warden of the California State Prison,* 237 U. S. 502, 510. How each State reacts to the problem at hand has no direct bearing upon the constitutional question raised by this appeal. Admittedly, there are differing views upon the same problem. The action taken by the legislatures of forty-odd different states, not acting in concert or in unison, could scarcely be expected to achieve exactly the same result. Had they done so, the astonishing result would have been little short of miraculous. Despite Petitioner's allegation to the contrary (brief p. 24) it will be seen (petitioner's brief p. 22) that at least one state (Indiana) has adopted the Pennsylvania view. Where two states out of a possible forty-eight achieve the same conclusion in a matter dealing with criminal penalties, and where a wide divergence of opinion is bound to exist, the conclusion

is readily reached that the adopted penalty must closely approximate the heinousness of the crime. But, as the situation really exists, more than two states reached the same conclusion. The three jurisdictions represented by the cases cited by Petitioner indicate a still more surprising unanimity of mind among the state legislatures. True, two of these acts differ in respect to the discretion allowed to the sentencing judge but the aims and objects of the statutes were undoubtedly in accord with those of the Pennsylvania Legislature. Thus, we can safely say that five states have agreed upon this method of punishment as being reasonably in agreement with the gravity of the offense. The Petitioner, in attacking the reasonableness of the act, substitutes, in effect, his personal judgment for that of five State Assemblys acting independent of each other. The absurdity of his contention is manifest.

CONCLUSION.

The judgment below should be sustained.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 25.—October Term, 1937.

Commonwealth of Pennsylvania, ex rel. Elmer Sullivan, Petitioner,
vs.
Stanley Ashe, Warden, State Penitentiary, Western District of Pennsylvania.

On Writ of Certiorari to the Supreme Court of Pennsylvania.

[November 8, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

The question presented in this case is whether, consistently with the equal protection clause, a State may classify punishments to be imposed on convicts breaking out of the penitentiary by authorizing the court to imprison each for a period not exceeding his original sentence.

September 21, 1936, petitioner, asserting that he was illegally committed to the Western Penitentiary of Pennsylvania to serve a sentence for the crime of breaking out of that prison, applied to the highest court of the State for a writ of habeas corpus. The court granted a rule to show cause and, after hearing counsel for the parties, held petitioner lawfully sentenced and discharged the rule. 325 Pa. St. 305. The petition for writ of certiorari asserts that this decision conflicts with *State* v. *Lewin*, 53 Kan. 679, *In re Mallon*, 16 Idaho 737, and *State* v. *Johnsey*, 46 Okla. Cr. App. 233. The statutes condemned in the Kansas and Idaho cases differ essentially from the Pennsylvania statute upheld in this case. Finding conflict between the decision below and that in the Oklahoma case, we granted the writ. Judicial Code, § 237 (b); 28 U. S. C., § 344 (b). 301 U. S. —.

The challenged provision, found in the Act of March 31, 1860, P. L. 382, declares (§ 3) that "if any prisoner imprisoned in any penitentiary . . . upon a conviction for a criminal offense . . . shall break such penitentiary . . . such person shall

be guilty of a misdemeanor, and upon conviction of said offense, shall be sentenced to undergo an imprisonment, to commence from the expiration of his original sentence, of the like nature, and for a period of time not exceeding the original sentence, by virtue of which he was imprisoned, when he so broke prison and escaped . . . ."

In 1929, petitioner pleaded guilty of the crimes of burglary and larceny and was sentenced to the Western Penitentiary for a term of from three to six years. In December, 1931, he broke out, and, after capture and conviction, was sentenced to imprisonment for a term of the same length as, and to commence at the expiration of, the original sentence.

To illustrate the inequalities between sentences permissible under the challenged provision, petitioner emphasizes the fact that, if two or more convicts escape together under the same circumstances, they may be sentenced for different terms. In fact, the record shows that petitioner escaped simultaneously with one McCann and that upon conviction for the same crime the latter was sentenced to serve a term equal to his original sentence, from one to two years.

But the fact that terms of imprisonment may differ as do original sentences does not warrant condemnation of the statute. The law has long recognized a relation between punishment for breach of prison and the offense for which the prisoner is held, and it has more severely punished prison breaking by one undergoing imprisonment for grievous crime than if done by one held for a lesser offense. Prior to the statute *de frangentibus prisonam* of 1 Edw. II (1307) every prison breaking by the offender himself, whatever the crime for which he was committed, was a felony, punishable by "judgment of life or member." This severity was mitigated by the statute. It forbade that judgment unless the breaking was by one committed for a capital offense.[1] Breach and escape by one held for felony continued to be dealt with as felony; but, if committed by one confined for an inferior offense, was punishable

[1] "That none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."

as a high misdemeanor by fine and imprisonment.[2] In harmony with that idea a number of States deal with that offense more severely when committed by one imprisoned for a heinous offense or a long term.[3] Indeed, this Court has sustained classification for punishment of crimes by convicts upon the basis of the sentences being served at the time. In *Finley* v. *California,* 222 U. S. 28, it held that a statute prescribing the death penalty for the commission by life prisoners of assaults with intent to kill, lesser punishments being laid upon other convicts, was not repugnant to the equal protection clause.

The principle is similar to that under which punishment of like crimes may be made more severe if committed by ex-convicts. Persistence in crime and failure of earlier discipline effectively to deter or reform justify more drastic treatment. *Graham* v. *West Virginia,* 224 U. S. 616, 623. *McDonald* v. *Massachusetts,* 180 U. S. 311. *Moore* v. *Missouri,* 159 U. S. 673, 677. *Plumbly* v. *Commonwealth,* 2 Metc. 413, 415. *People* v. *Sickles,* 156 N. Y. 541, 547. Save as limited by constitutional provisions safeguarding individual rights, a State may choose means to protect itself and its people against criminal violation of its laws. The comparative gravity of criminal offenses and whether their consequences are more or less injurious are matters for its determination. *Collins* v. *Johnston,* 237 U. S. 502, 510. *Howard* v. *Fleming,* 191 U. S. 126, 135-136. It may inflict a deserved penalty merely to vindicate the law or to deter or to reform the offender or for all of these purposes. For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. His past may be taken to indicate his present purposes and tendencies and significantly to suggest the period of restraint and the kind of discipline that ought to be imposed upon him.

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[2] See IV Blackstone, p. 130; I Hale's Pleas of the Crown, c. 54; II Hawkins' Pleas of the Crown, c. 18; II Wharton Criminal Law (12th ed.) § 2019. Rex *v.* Haswell, R. & R. 458. Commonwealth *v.* Miller, 2 Ashm. (Pa.) 61. Cf. Rex *v.* Fell, 1 Ld. Raym. 424; Kyle *v.* State, 10 Ala. 236; Commonwealth *v.* Homer, 5 Metc. 555, 558.

[3] Arizona, Revised Code 1928, § 4539. Connecticut, Gen. Stats. (1930 Revision) §§ 6173, 6175. Idaho, Code 1932, Title 17, §§ 803, 804. Indiana, Annotated Statutes, 1933, §10-1807. Maine, Revised Statutes, 1930, c. 133, § 16; c. 152, § 45. Minnesota, Mason's Statutes, 1927, § 10007. New York, Penal Law, § 1694. North Dakota, Compiled Laws 1913, § 9351. Washington, Remington's Revised Statutes, § 2342. Wisconsin, Statutes 1935, §§ 346.40, 346.45.

Presumably, the sentence being served at the time of prison breaking was determined upon due consideration of the pertinent facts. The judgment then pronounced is good evidence of the convict's natural or acquired bent of mind and his attitude toward the law and rights of others. The fact that he would and did break prison shows him still disposed to evil and determined to remain hostile to society. And that is sufficient to sustain the classification made by the Pennsylvania statute for punishment of prison breakers on the basis of their original sentences.

Affirmed.